IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 98 of 2012

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DY C I T - BHARUCH CIRCLE - BHARUCH - Appellant(s)
Versus
HINDUSTAN MI SWACO LTD - Opponent(s)

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Appearance :
MR KM PARIKH for Appellant
None for Respondent

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 06/11/2012

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Revenue is in appeal against the judgement of the Income Tax Appellate Tribunal dated 5.8.2011 raising following questions for our consideration :

> *"[i] Whether on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the addition of Rs.65,00,000/-, being the loan written off by the assessee as bad debt, which is not allowable, since the assessee is not in the business of banking or money lending?*
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> *[ii] Whether on the facts and in the circumstances of the case, the Tribunal was right in law in applying the ratio of the Apex Court's decision in the case of TRF Ltd. v. CIT reported in 323 ITR 397 when the facts of the instant case are entirely different in so much as the loan was not offered as income, as required u/s 36(1)(vii) of the Income Tax Act, 1961?*

[iii] Whether on the facts and in the circumstances of the case, the Tribunal was right in law in taking a contrary view, when an earlier coordinate Bench in this case, had already vide its order bearing ITA No.3774/Ahd/2008 dated 03/04/2009, decided that the condition contained in section 26(1)(vii) is clearly not satisfied in the instant case inasmuch as neither the debt has been taken into account in computing the income of the assessee in the year under consideration or in earlier years nor it represents money lent in the ordinary course of business of banking or money lending?"

2. Though multiple questions are framed, the issue is common, namely, of the claim of the assessee of writing off a certain amount of Rs.65 lakhs by way of bad debt. Previously, the issue had reached upto the Tribunal. The Tribunal by an *ex-parte* order dated 3.4.2009, held against the assessee. Subsequently however, the assessee applied by an application for recall of such an order since he was not present. Such order was granted in favour of the assessee. On 4.1.2010, the Tribunal thereupon proceeded to hear and decide the appeal afresh. In such exercise, the Tribunal ruled in favour of the assessee holding that the claim of bad debt was justified. The Tribunal noted that the Assessing Officer had two objections to allowing such claim of bad debt, namely, that the debt has not become bad and doubtful. This objection the Tribunal overruled by referring to and relying upon the decision of the Apex Court in case of ***TRF Ltd. v. Commissioner of Income Tax***, (2010) 323 ITR 397 (SC). The other objection of the Assessing Officer recorded by the Tribunal was that the assessee was not in the business of money lending and he was, therefore, not eligible for deduction as bad debt, but the principal

amount of loan given by the assessee. This objection also the Tribunal overruled relying on the decision of the Madras High Court in case of ***Commissioner of Income Tax v. City Motor Service Ltd.***, 61 ITR 418.

3. We are of the opinion that the Tribunal committed no error. The assessee put-forth a case of written off an advance of Rs.65 lakhs on the ground that despite filing a suit, the sum was not recoverable. The fact that the assessee had written off such an amount was not seriously in issue. In that view of the matter, the decision of the Supreme Court in the case of ***TRF Ltd. v. Commissioner of Income Tax*** (supra) would apply. In such decision, the Supreme Court has observed as under:

> *"4. This position in law is well-settled. After April 1, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. However, in the present case, the Assessing Officer has not examined whether the debt has, in fact, been written off in the accounts of the assessee. When a bad debt occurs, the bad debt account is debited and the customer's account is credited, thus, closing the account of the customer. In the case of companies, the provision is deducted from sundry debtors. As stated above, the Assessing Officer has not examined whether, in fact, the bad debt or part thereof is written off in the accounts of the assessee. This exercise has not been undertaken by the Assessing Officer. Hence, the matter is remitted to the Assessing Officer for de novo consideration of the abovementioned aspect only and that too only to the extent of the write-off."*

4. The other additional condition that the assessee had to fulfill to claim bad debt under section 36(1)(vii) of the Act

was to satisfy clause (i) of sub-section (2) of section 36 of the Act, which reads as under :

> *"**36. Other deductions**. - (2) In making any deduction for a bad debt or part thereof, the following provisions shall apply -*
>
> *(i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;"*

5. Clause (i) of sub-section (2) of section 36 of the Act itself provides that the claim for deduction as bad debt would not be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year. It is not the case of the revenue that such condition was not satisfied.

6. Counsel for the revenue did contend that the Tribunal having previously ruled against the assessee, could not have changed its decision. It is undoubtedly true that while exercising powers of rectification, the Tribunal does not enjoy power of review. In the present case, however, the original order of the Tribunal was passed in absence of the assessee. He had thereupon sought recall of the order showing sufficient ground justifying his absence. Such request for recall of the order was allowed. Such order of the Tribunal was never questioned. The Tribunal,

therefore, while deciding the appeal afresh, it enjoyed full power and was not hindered by any limitation.

7. In the result, no question of law arises. Tax Appeal is, therefore, dismissed.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

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